Attorney General
1275 WEST WASHINGTON
Phoenix, Arizona 85007
Robert K. Corbin

January 24, 1985

The Honorable Robert B. Usdane
Arizona State Senate
State Capitol, Senate Wing
1700 West Washington
Phoenix, Arizona 85007

Re: I85-011 (R84-169)

Dear Senator Usdane:

You have asked whether the Director of the Department of Health Services (DHS) has authority to transfer to Arizona State University (ASU) by quitclaim deed the Arizona Crippled Children's Hospital (Hospital). As explained below, it is our opinion that the DHS Director does not have such authority because (1) the hospital is state property the disposition of which is under legislative control and (2), even if DHS held title, the DHS Director does not have the authority to transfer the Hospital.

HISTORY

The land in question was originally granted to the City of Tempe on June 6, 1935 by the United States General Land Office pursuant to an Act of April 7, 1930, ch. 107, 46 Stat. 142, for "municipal, park, recreation or public convenience purposes . . . ."[1] The Act also provides that the land

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1. For a more detailed history of the Hospital, see Ariz.Atty.Gen.Op. I80-170.

can only be used by Arizona and Tempe for those purposes and, if any part of the land is abandoned for such use, that part shall revert to the United States. The U.S. patent transferring the land repeats these conditions.

On May 17, 1962 Tempe deeded the greater part of the land in question to the Arizona State Department of Health, predecessor to DHS, subject to the same conditions. Tempe also added a new restriction:

> [T]hat if the State of Arizona shall at any time, determine not to use the land for "municipal park, recreation or public convenience purposes" the State of Arizona will so notify the City of Tempe and reconvey the land to the City of Tempe. . . .

In June 1978 there was an exchange of land between Arizona and Tempe in which the state obtained the last 2.26 acres of land at issue in this matter. It was transferred to Arizona by quitclaim deed and remained subject to the original conditions imposed by the United States.

The hospital facility itself was originally constructed as a tuberculosis sanatorium with state funds appropriated to the Department of Health by the Arizona Legislature and federal "Hill-Burton" funds. Laws 1961 (1st Reg. Sess.) Ch. 90; Laws 1962 (2nd Reg. Sess.) Ch. 41. The federal funding was conditioned upon the facility's use by a non-profit or governmental entity as a public health center or a public or other non-profit hospital, outpatient facility, facility for long-term care or rehabilitation facility for twenty years following completion. That condition was satisfied on April 9, 1984.

By emergency act, on July 1, 1973, the Arizona Legislature transferred the Hospital facility and land from the Department of Health to the Arizona State Board of Crippled Children's Services. The Legislature also allocated state funds for converting the Hospital facility. Laws 1973 (1st Reg. Sess.) Ch. 9, §§ 6, 8 and 9. Later in 1973 the Legislature abolished both the Board of Crippled Children's Services and the Department of Health, and transferred their powers and duties to the new Arizona Department of Health Services. Laws 1973 (1st Reg. Sess.) Ch. 158, §§ 2, 3, 316 and 317. The act creating DHS

provided for a planned transition and transfer of property from the abolished agencies to DHS. Id., § 320.

DISCUSSION

The Arizona Legislature exercises part of the sovereign powers of the state. State ex rel. Jones v. Lockhart, 76 Ariz. 390, 395, 265 P.2d 447, 450 (1953). The Arizona Legislature has all governmental power not expressly denied it or given to some other branch of the state government. Id.; Turner v. Superior Court of Pima County, 3 Ariz. App. 414, 417, 415 P.2d 129, 132 (1966). Since the Arizona Constitution does not deny to the Arizona Legislature power over state property or give it to another branch, the Legislature's power over state property is absolute, subject only to the constitutional prohibition against gifts to private entities.[2] White v. State, 42 Ala. App. 249, 160 So.2d 496, 502 (1964); Ariz.Const., art. IX, § 7.

As noted above, the Hospital facility was constructed pursuant to legislative appropriation and authorization. It is the Arizona Legislature which allocated its use to the various agencies which have used it over the years. Nothing in the history of the hospital facility or the pertinent statutes suggests that the facility is anything other than state property over which the Arizona Legislature retains control.

Like the facility, the Hospital land is state property over which the Legislature retains control. Although Tempe nominally deeded the land to the State Department of Health, it is apparent from the deed itself that the land was transferred to Arizona for any use that met the deed restrictions. For instance, in the deed, the state was specifically made responsible for notification to Tempe and reconveyance of the land if at any time it determined not to use the land for municipal, park, recreation or public convenience purposes.

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2. The only exception to this, not applicable here, concerns those public lands and the revenue therefrom held in trust for the benefit of public schools and other public institutions. Trust lands and revenues may be used and disposed of only pursuant to Arizona Constitution, art. X and the Enabling Act, § 28 which expressly limit the Arizona Legislature's authority over such lands and revenues.

Further, the Department of Health was not empowered by the Legislature to take and hold title to either land or buildings in any proprietary sense. As a legislative creation, the Department of Health had only such power as granted it by the Arizona Legislature. Oracle School Dist. No. 2 v. Mammoth High School Dist. No. 88, 130 Ariz. 41, 43, 633 P.2d 450, 452 (App. 1981). The Department of Health Services was part of the Arizona state government and in acquiring the Hospital land it acted for the state and took title as an agency of the state. See State ex rel. Olsen v. Montana Armory Board, 128 Mont. 344, 275 P.2d 652, 654 (1954). It temporarily used the land for specific governmental purposes as authorized by the Legislature. Consequently, the Hospital land was state property the same as if the deed had named the State of Arizona as title-holder. Silver City Consolidated School Dist. No. 1 v. Board of Regents, New Mexico Western College, 75 N.M. 106, 401 P.2d 95, 99 (1965); Mississippi Valley Trust Co. v. Ruhland, et al., 359 Mo. 616, 222 S.W.2d 750, 752 (1949).

Before abolishing the Department of Health, the Arizona Legislature transferred the Hospital from the Department to the Board of Crippled Children's Services. This transfer, for the public purpose of providing services and medical care to crippled children, was within legislative authority. Silver City Consolidated School District No. 1. When the Board was also abolished, the Arizona Legislature transferred the Hospital to DHS which was newly created to, among other duties, assume responsibility for providing services and medical care to crippled children. Laws 1973 (1st Reg. Sess.) Ch. 158, §§ 316 and 320.

It is particularly noteworthy that the Legislature has never given DHS the authority to hold title to real property in its own name. Pursuant to A.R.S. § 36-106, DHS may only acquire land or buildings "for and in the name of the state" for the purpose of providing agency office space. Such acquisitions are subject to the approval of the Attorney General and the Director of the Department of Administration. A.R.S. § 36-106.B.

It is clear from a review of the Hospital's history and the pertinent statutes that both the land and the facility are state property under the control of the Arizona Legislature. The use of the Hospital was transferred to DHS by the Legislature. The agency is only entitled to such use of the Hospital as the Arizona Legislature has expressly granted it.

See Oracle School Dist. No. 2 (as a legislative creation an agency only has such power as it is granted by the legislature); Robbins v. Dept. of Public Works, 355 Mass. 328, 244 N.E.2d 577, 579 (1969) (public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion). DHS has never held any transferable title or interest in the Hospital.[3]

Even if DHS held title or some other transferable interest in the Hospital, its Director may not transfer such interest to ASU. The powers and duties of an administrative agency or office are to be measured by the statutes creating it. E.g. Cox v. Pima County Law Enforcement Merit System Council, 27 Ariz. App. 494, 495, 556 P.2d 342, 343 (1976). In Arizona it is generally held that administrative officers and agencies have no common law or inherent powers. Id. They have only those powers expressly conferred or those implied powers absolutely necessary to carry out the powers expressly granted them. E.g., Pressley v. Industrial Commission, 73 Ariz. 22, 31, 236 P.2d 1011, 1017 (1951); Oracle School Dist. No. 2. Neither DHS nor its Director have the requisite statutory authority to transfer to another entity any interest in the Hospital.[4]

The DHS Director, with the approval of the Attorney General and the Director of the Department of Administration, may acquire land or buildings, for and in the name of the state, for the purpose of providing DHS office space. A.R.S. § 36-106. The power to transfer title to or use of the Hospital to ASU,

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3. State ex rel. Goddard v. Coerver, 100 Ariz. 135, 412 P.2d 259 (1966) (state mental hospital board of directors may reconvey unused portion of hospital lands to county for construction of hospital), is not applicable to this matter. Here there is no trust established by deed or statute as in Coerver. Nor can it be argued that transfer of the Hospital to ASU, without consideration, in any way would directly benefit the crippled children of this state as trust beneficiaries. Unlike the state mental hospital board of directors, DHS has no express authority to accept and expend gifts and grants in trust.

4. In response to your second question, the Director's action in this matter did not violate any specific constitutional or statutory provisions.

however, simply cannot be implied from this grant. When the Arizona Legislature has intended that an agency which is authorized to acquire real property may also transfer it, the Legislature has expressly granted that authority. See e.g., A.R.S. § 41-726.C enacted by Laws 1984 (2nd Reg. Sess.), Ch. 271, § 1 in which the Legislature expressly authorized the Department of Administration to lease acquired property.

The attempted transfer of the Hospital to ASU is void since it is in excess of the authority granted to DHS and its director. E.g. Dallas v. Arizona Corporation Comm'n, 86 Ariz. 345, 347, 346 P.2d 152, 153 (1959); People v. Chambers, 37 Cal.2d 552, 233 P.2d 557, 562 (1951). The state is not bound by the DHS Director's unauthorized act, and the state's title to the Hospital is unaffected by the attempted transfer. Samsell v. State Line Development Co., 154 W. Va. 48, 174 S.E.2d 318, 325 (1970).

Since the attempted transfer was by quitclaim deed, no action to abrogate the attempted transfer is necessary. A quitclaim deed only conveys the grantor's interest to the grantee. Johnson v. Bell, 666 P.2d 308, 312 (Utah 1983); Birtrong v. Coronado Building Corp., 90 N.M. 670, 568 P.2d 196, 198 (1977); Sabo v. Horvath, 559 P.2d. 1038, 1043 (Alaska 1976). In this instance, DHS had no transferable interest to convey to ASU.

The quitclaim deed itself conveys nothing to ASU and the transaction is void for lack of authority; therefore, ratification of the quitclaim deed by the Legislature would not be effective to transfer the property. If the Arizona Legislature does wish to reallocate the use of the property to ASU, it only needs to authorize such use. Since the state has title to the property, the title would not change when the property is reallocated to ASU, an agency of the state.

Sincerely,

Bob Corbin

BOB CORBIN
Attorney General

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